

SYNOPSIS

PURCHASERS' USE TAX -- ASSESSMENT OF ADDITIONS TO TAX FOR NEGLIGENCE OR INTENTIONAL DISREGARD OF RULES OR REGULATIONS -- W. Va. Code § 11-10-18(c) expressly prohibits the Tax Commissioner from assessing additions to tax against a taxpayer for negligence or intentional disregard of rules or regulations, pursuant to § 11-10-18(c), and for either failure to file a return or to pay tax due and owing, pursuant to the provisions of W. Va. Code § 11-10-18(a).

PURCHASERS' USE TAX -- NOTICE TO TAXPAYER OF GROUNDS FOR ASSESSING ADDITIONS TO TAX PURSUANT TO W. VA. CODE § 11-10-18(c) -- When the Tax Commissioner assesses additions to tax against a taxpayer for either negligence or intentional disregard of rules and regulations, W. Va. Code § 11-10-18(c) requires her to state in her notice of assessment to the taxpayer the reason or reasons that she is assessing said additions to tax.

PURCHASERS' USE TAX -- NEGLIGENCE OR INTENTIONAL DISREGARD OF RULES OR REGULATIONS AS GROUNDS FOR ASSESSING ADDITIONS TO TAX PURSUANT TO W. VA. CODE § 11-10-18(c) -- TAX COMMISSIONER'S BURDEN OF MAKING *PRIMA FACIE* CASE -- When the Tax Commissioner assesses additions to tax against a taxpayer for negligence or intentional disregard of rules and regulations pursuant to W. Va. Code § 11-10-18(c), she is required to provide evidence sufficient to make at least a *prima facie* showing that the taxpayer was either negligent or that it intentionally disregarded rules or regulations.

FINAL DECISION

A tax examiner with the Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner. Thereafter, on May 6, 2003, the Director of this Division issued a purchasers' use tax assessment against the Petitioner. The assessment was issued under the authorization of the State Tax Commissioner, pursuant to the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code. The assessment was for the period of April 1, 2000 through February 28, 2003, for tax, interest, computed through May 31, 2003, and additions to tax, for a total assessed tax liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked May 29, 2003, and received on June 3, 2003, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment, seeking only waiver of the additions to tax. *See* W. Va. Code § 11-10A-8(1) [2002]. At the time it filed its petition for reassessment, the Petitioner remitted an amount, which was the combined amount of tax and interest assessed by the Tax Commissioner.

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

There was no appearance on behalf of the Petitioner when the hearing was convened. The hearing was held, however, without an appearance on behalf of the Petitioner or the Commissioner, in accordance with the provisions of W. Va. Code § 11-10A-10(a) [2002] and 121 C.S.R. 1, § 69.1 (Apr. 20, 2003).

FINDINGS OF FACT

1. The Petitioner operates restaurants in the State of West Virginia.
2. The Petitioner purchases items of tangible property and services for use in its restaurants.
3. During the audit period that is the subject of this action, tangible items purchased by the Petitioner upon which the Tax Commissioner assessed use tax consisted primarily of items incorporated into the restaurant facilities, such as art work, plants, salad bar equipment, and signs. *See* State's Exhibit No. 3.
4. Services purchased by the Petitioner upon which the Tax Commissioner assessed use tax consisted primarily of services performed on and in the restaurant facilities, such as mill work, repairs and upgrades to the facilities, and replacement of old equipment and decorative items. *See* State's Exhibit No. 3.

5. The audit work papers indicate that the invoices respecting purchases by the Petitioner, upon which the Tax Commissioner assessed purchasers' use tax, did not include consumers' sales tax collected by the vendors from whom the Petitioner purchased the goods and services. See State's Exhibit No. 3.

6. For the periods February, 2001, through June, 2003, the Petitioner filed "West Virginia Use Tax Returns" which show that it made no taxable purchases and that it did not owe any purchasers' use tax.¹

7. The audit workpapers indicate that the additions to tax assessed on the basis of both the Petitioner's negligence or intentional disregard of rules and regulations, pursuant to W. Va. Code § 11-10-18(c), and the Petitioner's failure to pay tax due, pursuant to W. Va. Code § 11-10-18(a)(2).

8. The notice of assessment issued by the State Tax Commissioner sets forth no grounds upon which she based the assessment of additions to tax due to the Petitioner's negligence or its intentional disregard of rules and regulations.

9. The computation of additions to tax set forth in the audit workpapers, which were computed at 5% per month up to a maximum amount of 25%, clearly demonstrates that the additions to tax were assessed on the basis of the Petitioner's negligence or intentional disregard of rules and regulations, as opposed to its failure to pay tax due, which would have been assessed at .5% per month, to a maximum of 25%.

10. The Petitioner did not appear at the hearing in this matter and presented no evidence that would justify the waiver of additions to tax.

¹ The returns filed by the Petitioner and provided by the Tax Commissioner at the hearing do not include returns for March, 2001, or February, 2003. The Tax Commissioner also included returns for March, 2003, through June, 2003, although those months are subsequent to audit period. There are also some returns for which duplicates were filed.

11. Counsel for the Tax Commissioner stated at the evidentiary hearing, without supporting evidence, that the Petitioner had failed to pay use tax on purchases of this nature during a prior audit period.

DISCUSSION

The only issue presented in this action is whether the Petitioner is entitled to abatement of the additions to tax assessed for negligence or intentional disregard of rules and regulations.

Additions to tax may be assessed in the case of any underpayment of tax that is due to negligence on the part of the taxpayer, or where a taxpayer intentionally disregards any rules or regulations respecting any tax administered under the Tax Procedures Act. W. Va. Code § 11-10-18(c). W. Va. Code § 11-10-18(c) provides:

(c) Negligence or intentional disregard of rules and regulations. -- If any part of any underpayment of any tax administered under this article is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the amount of tax due five percent of the amount of such tax if the underpayment due to negligence or intentional disregard of rules and regulations is for not more than one month, with an additional five percent for each additional month, or fraction thereof during which such underpayment continues, not exceeding twenty-five percent in the aggregate: Provided, That these additions to tax shall be imposed only on the net amount of tax due and shall be in lieu of the additions to tax provided for in subsection (a), and the tax commissioner shall state in his notice of assessment the reason or reasons for imposing this addition to tax with sufficient particularity to put the taxpayer on notice regarding why it was assessed. (Emphasis added.)

When the Commissioner determines that the taxpayer has been negligent, or has disregarded rules or regulations, additions to tax may be assessed at 5% per month, up to a maximum amount of 25%.

In that portion of the audit workpapers wherein additions to tax are computed, the grounds articulated there for the assessment of additions to tax are both the negligence of the Petitioner and the Petitioner's failure to pay tax due and owing, as provided by W. Va. Code §

11-10-18(a)(2). It appears that the Tax Commissioner takes the position that the Petitioner was negligent but, in the alternative, if it is found that the Petitioner was not negligent, then it should be assessed additions to tax at the lower rate for failure to pay the tax owed.

It is impermissible for the Tax Commissioner to assess additions to tax under both W. Va. Code § 11-10-18(a) and (c). W. Va. Code § 11-10-18(c) provides that additions to tax assessed under that subsection are in lieu of those assessed under W. Va. Code § 11-10-18(a). Once additions to tax are assessed pursuant to § 11-10-18(c), they may not be assessed pursuant to § 11-10-18(a). Therefore, once additions to tax are assessed pursuant to § 11-10-18(c), any attempt to assess them pursuant to § 11-10-18(a) is void.

In this matter, the additions were computed at 5% per month, the rate permitted by § 11-10-18(c), not .5%, the rate permitted by § 11-10-18(a). This computation clearly demonstrates the Tax Commissioner's intended to assess additions to tax for negligence, pursuant to § 11-10-18(c), as opposed to additions tax for failure to pay, pursuant to § 11-10-18(a). In light of the clear and unambiguous language of W. Va. Code § 11-10-18(c), once the Tax Commissioner decided to assess additions to tax pursuant to § 11-10-18(c), any assessment of additions to tax pursuant to § 11-10-18(a) was void.

With respect to the Tax Commissioner's attempt to assess additions to tax on the grounds of the Petitioner's negligence, the Tax Commissioner must comply with the requirements of § 11-10-18(c). That subsection requires the Tax Commissioner to "state in the notice of assessment the reason or reasons for imposing this addition to tax with sufficient particularity to put the taxpayer on notice regarding why it was assessed." In this matter, the notice of assessment itself does not refer at all to the type of additions; instead, the Tax Commissioner made the following statement on the cover sheet of the audit workpapers: "ADDITIONS TO

TAX WERE APPLIED AGAINST THE ASSESSMENT WHICH RESULTED FROM NONREMITTANCE RETURNS BEING FILED.” This Office is convinced that this language does not satisfy the requirements of W. Va. Code § 11-10-18(c).

First, W. Va. Code § 11-10-18(c) is clear and unambiguous. It expressly *requires* that the reason or reasons for imposing additions to tax pursuant to § 11-10-18(c) be stated in the notice of assessment with sufficient particularity to put the taxpayer on notice regarding why the additions were assessed. It is not sufficient that the reason for assessing the addition to tax be set forth in the audit workpapers, even on the face of the audit workpapers. In this matter, the only reason articulated for the assessment of the addition to tax was set forth in the audit workpapers. Thus, the Tax Commissioner did not satisfy the express requirements of § 11-10-18(c).²

The second reason for this requirement seems apparent. Due process requires that the taxpayer receive notice of the basis of the assessment. In the “usual” situation where there is a “mere” failure to file or failure to pay, the taxpayer knows that it has either failed to file its returns, failed to pay the tax, or both. When the Tax Commissioner assesses additions to tax, the taxpayer is on notice of whether the assessment is for failure to file or failure to pay, based on the amount of additions assessed.³ It is in the less common situation, where the taxpayer is purportedly negligent or where it purportedly disregards rules and regulations, that the taxpayer must be notified with particularity of the exact conduct with which it is charged, so that it may have the opportunity to appear at the hearing fully prepared to address the allegations, if it so desires.

² This would be true, even if the specific reason for the assessing an addition to tax for negligence was set forth in audit workpapers that are furnished to a taxpayer with the notice of assessment. While this may appear to be exalting form over substance, the statute clearly and unambiguously requires the reason or reasons to be set forth *in* the notice of assessment.

³ If the additions to tax are assessed at 5% per month, the taxpayer they are assessed for failure to file. If they are assessed at .5% per month, then the taxpayer knows they are assessed for failure to pay.

In the present matter, not only did the Tax Commissioner fail to set forth any reason for the assessment of an addition to tax for negligence in the notice of assessment, the reason articulated in the audit workpapers does not, by itself, specify any act of negligence on the part of the Petitioner that might support the assessment of an addition to tax for negligence pursuant to W. Va. Code § 11-10-18(c). Instead, it merely states that the taxpayer failed to pay any use tax on its purchases. This appears to be nothing more than a mere assertion that the Petitioner failed to pay use tax due and owing, for which additions to tax may be assessed pursuant to W. Va. Code § 11-10-18(a)(2). This does not, by itself, rise to the level of either negligence or intentional disregard of rules and regulations.

This tribunal concludes that requiring the Tax Commissioner to come forward with evidence sufficient to make at least a *prima facie* showing of negligence on the part of a taxpayer is not contrary to W. Va. Code § 11-10A-10(e) [2002] or 121 C.S.R. § 63.1 (Apr. 20, 2003), which place the burden of proof on the taxpayer to prove that the assessment is incorrect. In other circumstances, where the Tax Commissioner presents the assessment and audit workpapers, she has presented evidence which constitutes at least a *prima facie* showing of the amount of tax due, plus interest thereon. She has also presented evidence demonstrating that the taxpayer has either failed to file tax returns or failed to pay tax due and owing. The assessment and the audit workpapers, taken together, constitute evidence of the taxpayer's actions that give rise to the assessment.

The same is not true with respect to an assertion of negligence. Where the Tax Commissioner intends to assert that the taxpayer was negligent or intentionally disregarded rules and regulations, the audit workpapers and the assessment, standing alone, do not constitute

evidence of negligence.⁴ If this were not the case, mere failure to file or failure to pay would constitute negligence.

In this matter, the Tax Commissioner assessed additions to tax against the Petitioner because, in her view, the Petitioner was negligent. However, the Tax Commissioner failed to give the Petitioner adequate notice of the grounds for asserting that it was negligent, as required by W. Va. Code § 11-10-18(c), and failed to provide any evidence to show that the Petitioner was negligent. Consequently, the Petitioner, under these circumstances, is entitled to an abatement of the additions to tax assessed pursuant to W. Va. Code § 11-10-18(c).

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. In order for an assessment issued by the Tax Commissioner to be valid, the Commissioner must satisfy all requirements imposed by statute and by legislative rules.

3. In this matter, the Tax Commissioner failed to satisfy the statutory requirements of W. Va. Code § 11-10-18(c), which required the Tax Commissioner to give the Petitioner adequate notice in the assessment of the grounds upon which she based her conclusion that the Petitioner was negligent or disregarded rules and regulations, thereby justifying the imposition of additions to tax pursuant to that section.

⁴ They can constitute proof of a taxpayer's failure to file or failure to pay, since those actions on the part of a taxpayer are apparent from the face of the audit workpapers, and those are facts that may be objectively determined. On the other hand, negligence is not apparent from the audit workpapers, and negligence is a more subjective determination.

4. The Tax Commissioner further failed to produce *any evidence* in this matter which would make at least a *prima facie* showing that the Petitioner was negligent or intentionally disregarded rules or regulations, thereby justifying the assessment of additions to tax pursuant to W. Va. Code § 11-10-18(c).

5. Due to the Tax Commissioner's failure to give proper notice to the Petitioner or to produce any evidence proving that the Petitioner was negligent, the Petitioner is entitled to abatement of the additions to tax assessed against it and, because the Petitioner paid all tax and interest assessed against it, it is entitled to dismissal of the assessment.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that with respect to the purchasers' use tax assessment issued against the Petitioner for the period of April 1, 2000 through February 28, 2003, for tax, interest, computed through May 31, 2003, and additions to tax, for a total assessed tax liability, the Petitioner having remitted the full amount of tax and interest due assessed against it, and having challenged only the assessment of additions to tax, in accordance with the above Conclusions of Law the additions to tax are **ABATED** in full.